Mohd Shamsul bin Abdul Aziz @ Abdul Azis v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–76–03 OF 2014 AND B-05–77–03 OF 2014
TENGKU MAIMUN, ZAWAWI SALLEH AND ABANG ISKANDAR JJCA
3 DECEMBER 2015

Criminal Law — Murder — Appeal against conviction and sentence — Intention to commit murder — Whether intention to commit murder could only be drawn when person killed was struck with more than one blow — Whether charge for murder against first appellant was made out by relying on cases with a dissimilar factual matrix — Common intention — Whether prosecution had adduced direct or circumstantial evidence to link second appellant to act of killing deceased — Whether murder committed in pursuance of common intention of both appellants

Mohd Shamsul bin Abdul Aziz ('the first appellant') and his sister, Tuti Adayu bt Abdul Aziz ('the second appellant') were jointly charged with the murder of Nen bin Ariffin ('the deceased'). The prosecution adduced evidence of how the appellants had approached the deceased at the veranda of his house to enquire about renting a house. In the course of making enquiries the appellants had gained entry into the deceased's house. The second appellant had then gained entry into the deceased's bedroom and robbed the deceased's wife ('PW12') of the jewellery she was wearing. When PW12 entered the living room of the house, she had seen the first appellant standing behind the deceased holding a knife in his hand and blood oozing from the deceased's abdomen. Shortly thereafter both appellants fled in a car. The deceased died a day after the incident. According to the post mortem report, the cause of death was listed as 'stab wound of the abdomen'. The ensuing investigations had led to the arrest of the appellants, who were subsequently charged for murder and robbery. The trial judge found the appellants guilty of both charges. The appellants were convicted of both offences and were sentenced to death for the charge of murder. The first and second appellants' appeal against their conviction and sentence for the charge of murder were heard together. The first appellant contended that the trial judge had erred when he came to the conclusion that the charge for murder as preferred against him was made out by relying on cases with a dissimilar factual matrix. The first appellant submitted that in the cases cited by the prosecution the deceased had suffered multiple blows whereas in the present appeal there was only a single stab inflicted on the deceased person. The first appellant then cited the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 as an authority for the proposition that an

inference of the intention to cause death could only be drawn when the person killed was struck with more than one blow. The second appellant submitted that the issue of common intention under s 34 of the Penal Code, was not applicable to the factual circumstances of this case. The second appellant claimed that she had not seen the act of stabbing done by the first appellant and that there was also no evidence that she had known that the first appellant was carrying a knife with him.

Held, dismissing the first appellant's appeal and allowing the second appellant's appeal:

(1) The case of *Tham Kai Yau & Ors v Public Prosecutor*, did not suggest that an inference of the intention to commit murder could only be drawn when the person killed was struck with more than one blow. In effect, the passage relied upon by the first appellant conveyed that where there had been evidence of more than one blow having been employed by an accused person on the victim, the court would become more ready to come to the conclusion on the intention of the accused person (see paras 12–13).

(2) In the present case, the trial judge had addressed his mind to the issue that there was only one stab wound that was inflicted on the deceased. However, the trial judge had found that the one injury inflicted on the deceased by the first appellant, was so inflicted at a critical part of the deceased's anatomy, namely at his abdomen area, as to eventually lead to the death of the deceased. Another feature of that stab wound, as observed by the pathologist, was that it was inflicted with much force. It was in that context that *Tham Kai Yau*'s case ought to have been viewed and applied in this case. Applying the test in *Tham Kai Yau*'s case to the circumstances in this case, it was clear that the injury inflicted by the first appellant on the deceased, although only a single stab, was the most probable cause of the death of the deceased, as indeed it had turned out to be. This was amply demonstrated in the testimony of the pathologist. In such a case, it was murder, an offence under s 302 of the Penal Code, as opposed to a lesser offence of culpable homicide not amounting to murder. As such, the trial judge had not erred in concluding and in sustaining the charge of murder against the first appellant and there was no merit in the first appellant's argument in that regard (see paras 14–18).

(3) Once common intention was shown to exist, thereby connoting a pre-arranged plan among the accused persons, then, any act however small done by any one of them, as long as it was done in furtherance of a common intention, would make the co-accused person liable for the offence, as if the offence was committed by him alone. That was the process under s 34 of the Penal Code in order to determine liability of persons acting in furtherance of a common intention. Upon applying

this principle underlying s 34 of the Penal Code to the evidence in the appeal, it became apparent that the prosecution had failed to adduce neither direct nor circumstantial evidence that could be used as a basis to link the second appellant to the act of killing the deceased on that fateful night. Although common intention could be formed immediately before the commission of the impugned act, there was no evidence led by the prosecution from which such an inference could be concluded against the second appellant to the effect that she, together with the first appellant had committed the offence of murder in pursuance of a common intention of them both. Based on the evidence, at the most the second appellant saw the stabbing, but there was no evidence to show what act she had done in the direction leading to the murder of the deceased. As such, in the absence of a common intention to commit murder, the second appellant was not guilty of the murder charge under s 302 of the Penal Code (see paras 25–30).

[Bahasa Malaysia summary

Mohd Shamsul bin Abdul Aziz ('perayu pertama') dan saudara perempuannya, Tuti Adayu bt Abdul Aziz ('perayu kedua') dipertuduh bersama atas pembunuhan Nen bin Ariffin ('si mati'). Pihak pendakwaan mengemukakan keterangan bagaimana perayu-perayu mendekati si mati di beranda rumah si mati untuk bertanya tentang sewaan rumah. Semasa membuat pertanyaan, perayu-perayu telah masuk ke dalam rumah si mati. Perayu kedua masuk ke dalam bilik tidur si mati dan merompak barang kemas yang dipakai oleh isteri si mati ('PW12'). Apabila PW12 memasuki ruang tamu rumah, dia melihat tangan si mati memegang sebilah pisau dan darah keluar daripada abdomen si mati. Sejurus selepas itu, perayu-perayu melarikan diri menaiki kereta. Si mati meninggal dunia sehari selepas kejadian tersebut. Laporan bedah siasat menyatakan bahawa kematian berpunca daripada luka tikaman pada abdomen. Siasatan membawa kepada tangkapan perayu-perayu yang kemudiannya dipertuduh membunuh dan merompak. Hakim bicara mendapati perayu-perayu bersalah atas kedua-dua pertuduhan. Perayu-perayu disabitkan atas kedua-dua kesalahan dan dijatuhkan hukuman mati atas pertuduhan membunuh. Rayuan perayu-perayu terhadap sabitan dan hukuman dibicarakan bersekali. Perayu pertama menyatakan bahawa hakim bicara terkhilaf apabila beliau memutuskan bahawa pertuduhan membunuh yang dikemukakan terhadapnya dibuat berasaskan kes-kes yang tidak sama fakta matriknya. Perayu pertama menghujahkan bahawa dalam kes-kes oleh pihak pendakwaan, si mati mengalami beberapa pukulan sedangkan dalam rayuan ini, hanya satu tikaman yang dikenakan pada si mati. Perayu pertama mengemukakan kes *Tham Kai Yau & Ors v Public Prosecutor* [1977] MLJ 174 sebagai autoriti cadangan bahawa inferens niat untuk menyebabkan kematian hanya boleh dibuat apabila orang yang dibunuh dipukul melebihi satu pukulan. Perayu kedua menghujahkana bahawa isu niat bersama di bawa s 34 Kanun Keseksaan tidak terguna pakai pada hal keadaan fakta kes ini. Perayu

kedua menghujahkan bahawa dia tidak melihat perayu pertama menikam dan bahawa tiada keterangan yang menunjukkan bahawa dia tahu perayu pertama membawa sebilah pisau bersama-samanya.

Diputuskan, menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua:

(1) Kes *Tham Kai Yau & Ors v Public Prosecutor* tidak mencadangkan inferens niat melakukan pembunuhan hanya boleh dibuat apabila orang yang dibunuh dipukul lebih daripada satu kali. Kesannya, perenggan yang menjadi sandaran perayu pertama bahawa apabila terdapat keterangan lebih daripada satu pukulan dibuat oleh tertuduh ke atas mangsa, mahkamah bersedia untuk memutuskan tertuduh mempunyai niat (lihat perenggan 12–13).

(2) Dalam kes ini, hakim bicara telah mengarahkan mindanya kepada isu bahawa hanya ada satu luka tikaman pada si mati. Walau bagaimanapun, hakim bicara mendapati bahawa satu kecederaan yang dikenakan oleh si mati terhadap perayu pertama, dikenakan pada bahagian penting badan si mati, khususnya bahagian abdomen, yang akhirnya menyebabkan kematian si mati. Satu lagi sifat luka tikaman tersebut, berdasarkan pemerhatian ahli patologi, adalah bahawa ia dikenakan dengan kuat. Dalam konteks inilah kes *Tham Kai Yau* seharusnya dilihat dan terguna pakai dalam kes ini. Mengguna pakai ujian kes *Tham Kai Yau* dalam hal keadaan kes ini, jelas bahawa kecederaan yang dikenakan oleh perayu pertama terhadap si mati, walaupun satu tikaman, berkemungkinan besar penyebab kematian si mati, seperti yang berlaku. Ini dicerminkan dalam testimoni ahli patologi. Dalam kes sedemikian, ia adalah pembunuhan, satu kesalahan di bawah s 302 Kanun Keseksaan, berbanding kesalahan yang kurang iaitu menyebabkan kecederaan yang tidak terjumlah kepada membunuh. Dengan itu, hakim bicara tidak khilaf dalam menyimpulkan dan dalam mengekalkan pertuduhan membunuh terhadap perayu pertama dan tiada merit dalam hujahan perayu pertama tentang hal itu (lihat perenggan 14–18).

(3) Apabila niat bersama dibuktikan wujud, menunjukkan bahawa terdapat perancangan yang diatur terlebih dahulu antara tertuduh-tertuduh, apa-apa tindakan yang dilakukan oleh mereka, sekecil mana sekalipun, asalkan dilakukan lanjutan niat bersama, akan menjadikan tertuduh bersama bersalah atas kesalahan, sekiranya kesalahan dilakukan olehnya seorang. Itu adalah proses di bawah s 34 Kanun Keseksaan untuk menentukan liabiliti orang-orang yang bertindak lanjutan niat bersama. Mengguna pakai prinsip yang termaktub dalam Kanun Keseksaan pada keterangan dalam rayuan, jelas bahawa pihak pendakwaan gagal mengemukakan sama ada keterangan langsung atau ikut keadaan yang boleh dijadikan asas untuk mengaitkan perayu kedua dengan tindakan

membunuh si mati pada malam kejadian. Walaupun niat bersama boleh dibentuk serta-merta sebelum pelakuan tindakan, tiada keterangan oleh perayu kedua yang menunjukkan bahawa dia, bersama-sama dengan perayu pertama telah melakukan kesalahan membunuh lanjutan niat bersama mereka berdua. Berdasarkan keterangan, paling tidak perayu kedua melihat tikaman tetapi tiada keterangan yang menunjukkan tindakan yang dilakukan olehnya secara langsung yang membawa kepada pembunuhan si mati. Dengan itu, tanpa niat bersama untuk membunuh, perayu kedua tidak bersalah atas pertuduhan di bawah s 302 Kanun Keseksaan (lihat perenggan 25–30)]

Notes

For cases on appeal against conviction and sentence, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1736–1737.

Cases referred to

Duis Akim & Ors v PP [2014] 1 MLJ 49; [2014] 1 MLRA 92, FC (refd)
Shaiful Edham bin Adam & Anor v PP [1999] 2 SLR 57, CA (refd)
Mahboob Shah v Emperor AIR 1945 PC 118, PC (refd)
Tan Buck Tee v PP [1961] 27 MLJ 176, CA (distd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (folld)

Legislation referred to

Penal Code ss 34, 302, 395, 397
Penal Code [IND] s 34

Appeal from: Criminal Trial No 45B-67 of 2010 (High Court, Shah Alam)

KA Ramu (KA Ramu Vasanthi & Assoc) in Criminal Appeal Nos B-05–76–03 of 2014 and B-05–77–03 of 2014 for the appellants.
Nurshafini bt Mustafha (Deputy Public Prosecutor, Attorney General's Chambers) Criminal Appeal Nos B-05–76–03 of 2014 and B-05–77–03 of 2014 for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

INTRODUCTION

[1] Mohd Shamsul bin Abdul Aziz @ Abdul Azis ('the first appellant') and his sister, Tuti Adayu bt Abdul Aziz @ Abdul Azis ('the second appellant') were both initially charged under s 302 of the Penal Code ('the first charge') and ss 395 and 397 of the same Code ('the second charge').

[2] The learned High Court judge found both of them guilty and convicted them with both offences on 26 February 2014. Both of them were sentenced to

death for the first charge. As for the second charge, the first appellant was sentenced to eight years of imprisonment as well as three strokes of whipping. The second appellant was also sentenced to eight years of imprisonment but she was not sentenced to any order of whipping in relation to the robbery charge.

[3] Both appellants had since appealed against the decision of the learned High Court judge to the Court of Appeal in relation to the first charge only, namely for murder. We sighted no notice of appeal having been filed in respect of the second charge, namely the robbery charge.

[4] The charge for under s 302 of the Penal Code reads as follows:

> Bahawa kamu bersama-sama pada 27 Februari 2010 jam lebih kurang 8.15 malam, di No. 35, Jalan Kembojasari 12, Bandar Sg. Buaya, Bukit Sentosa, di dalam Daerah Hulu Selangor, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Nen bin Ariffin (No. K/P: 351208-02-5069), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaandan dibaca bersama dengan seksyen 34 Kanun yang sama.

THE PROSECUTION'S CASE

[5] On 27 February 2010, around 8.15pm, according to Siti Aminah bt Lateh ('PW12'), her husband, Nen bin Ariffin ('the deceased'), had just came home from the 'surau' when he was approached by a Malay couple, who were later identified as the appellants. The appellants had asked about renting a house. PW12 who, at that time had just finished performing her prayers, went to the living hall of her house to see what was going on at the veranda of the house.

[6] According to PW12, the deceased told them that there was an empty house next to their house which could be available for renting. The deceased had given them the phone number to contact the owner. The second appellant had then asked from the deceased, a pencil to write down the phone number. The second appellant then followed him into the house and later she followed PW12 into her bedroom without being invited to do so. It was then alleged that while inside the bedroom, the second appellant had relieved PW12 of the jewelleries that the latter was wearing without her consent, namely two necklaces and two bracelets.

[7] At about the same time, the first appellant had also entered into the house. In the living hall, PW12 saw the first appellant standing behind the deceased by holding a knife in his hand. Not long after that, PW12 saw blood

oozing out apparently from the deceased's abdomen. Both appellants then left the house and fled in a Proton Saga car that they had driven in when they came to PW12's house earlier.

[8] The deceased was pronounced dead a day after the incident ie on 28 February 2010, due to stab wound to the abdomen. The cause of death as per the post-mortem report prepared by the pathologist (exh P13) was 'Stab wound of the abdomen'.

[9] After the incident, PW12 found a hand phone believed to belong to the second appellant in her bedroom. The ensuing investigations had led to the arrest of both the appellants. They were subsequently charged for the offences as alluded to above.

THE APPEALS

[10] Both appeals were heard by us together on 7 January 2015. The defence counsel, when submitting for the first appellant before us, had raised the issue that there was only one single stab inflicted on the deceased. As there was no defensive wound suffered by the deceased, it was contended that there was no intention on the part of the first appellant to kill the deceased.

[11] Learned counsel Mr KA Ramu, in the course of his submissions had argued that the case that was cited and relied on by the learned trial judge, namely the case of *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2014] 1 MLRA 92 must be distinguished from this case, on account of their dissimilar factual matrix. It was stressed before us that the deceased in *Duis Akim*'s case had suffered 12 stabs in total, over the neck and upper back regions of his body. Likewise in the case of *Tan Buck Tee v Public Prosecutor* [1961] 27 MLJ 176, there were five appalling wounds found on the deceased. Whereas, according to learned counsel, in this instant appeal, there was only a single stab inflicted on the deceased person. Premised on that contention, learned counsel then referred us to the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 as an authority for the proposition that an inference of the intention to cause death can be drawn when the person killed was struck with more than one blow. Therefore, the learned High Court judge had erred when he came to the conclusion that the charge for murder as preferred against the first appellant was made out.

[12] The passage which learned counsel for the first appellant had sought to rely on in *Tham Kai Yau*'s case is now reproduced below:

> The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case,

such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

[13] To our mind, that passage does not suggest that in order for an inference be made that there was an intention to commit murder, there must be more than one blow. What that passage conveys is that where there have been evidence of more than one blow having been employed by an accused person on the victim, the court will become more ready to come to the conclusion on the intention of the accused person. The crux of the passage indeed resides in the opening sentence that goes: 'The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death'.

[14] Reverting back to case before us, the learned trial judge had said that the injury was inflicted by force. This can be seen in his grounds of judgment which we now reproduce below:

Di dalam kes ini saya tidak meragui dapatan oleh Patologis (SP9) dan laporan beliau Ekshibit P13, seterusnya penemuan beliau mengenai sebab-sebab kematian iaitu 'Stab wound of the abdomen'.

[15] In fact, the learned trial judge was aware of the concern that was raised by learned counsel in that there was only one stab wound that was inflicted on the deceased. He did address his mind to that issue. This is what he had said:

Walaupun hanya satu tikaman yang dilakukan, akan tetapi tikaman itu adalah secara 'force' sehingga mencederakan organ-organ penting simati dan mengakibatkan kehilangan banyak darah seterusnya menyebabkan simati meninggal dunia. Jelas di sini wujud mens rea 'T' untuk membunuh simati yang boleh dianggapkan ada pada 'T' (see p 37, para 49 of His Lordship's grounds of judgment).

[16] From the above-quoted passage from the decision of the learned trial judge, it was apparent to us that what the learned trial judge had said had been that although there was only one injury that was inflicted on the deceased by the first appellant, it was so inflicted at a critical part of the deceased's anatomy, namely at his abdomen area thereby causing injuries to the internal organs of the deceased thereby causing much of loss of blood, leading to the death of the deceased. Another feature of that stab wound, as observed by the pathologist, was that it was inflicted with much force. Considered together, such injury so inflicted was *most probable* than it was *likely* to cause death. It was in that context that *Tham Kai Yau*'s case ought to be viewed and applied in this case. We reproduce here what the learned apex justices in that case had stated, through the speech of learned Justice Raja Azlan Shah FCJ (as he then was):

... Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is likely to result, it is culpable homicide. If it is the *most*

probable result, it is murder. (Emphasis added.)

[17] In that regard, the court will, in most cases look at the testimony of the pathologist, an expert as well as an independent witness, who would have the material evidence pertaining to the injury that was inflicted on the person of the deceased. It was a stab wound which he had found at the abdomen of the deceased, when he did the post-mortem. The purpose of looking at his evidence must necessarily be with a view of ascertaining the cause of the death of the deceased. It is significant in that it would provide a linkage between the fatal injury and the accused person, if at all. If the factual circumstance has been established that the fatal injury was caused by the accused person, the nature of the fatal injury, as was diagnosed by the pathologist, would go, in assisting the court in determining, to a great extent, the factum of intention on the part of the accused person, in the absence of direct evidence admitting to the guilt.

[18] Applying the test in *Tham Kai Yau*'s case to the circumstances in this case, we were of the view that the injury inflicted by the first appellant on the deceased, although only a single stab, it was the most probable cause of the death of the deceased, as indeed it had turned out to be. This was amply demonstrated in the testimony of the pathologist, SP9. In such a case, it is murder, an offence under s 302 of the Penal Code, as opposed to a lesser offence of culpable homicide not amounting to murder. This was in fact the conclusion of the learned trial judge. With respect, the learned trial judge did not err in so concluding and in sustaining the charge of murder against the first appellant. As such, we found no merit in the argument that was advanced by learned counsel for the first appellant in that regard.

COMMON INTENTION

[19] As for the second appellant, the defence counsel had raised the issue of common intention under s 34 of the Penal Code, which he contended was not applicable to the factual circumstances of this case. There is no evidence that the act of stabbing was pre-planned. The second appellant did not see the act of stabbing done by the first appellant. There was also no evidence that the second appellant knew that the first appellant was carrying a knife with him.

[20] We reproduce s 34 of the Penal Code for ease of reference. It reads as follows:

> 34 Each of several persons liable for an act done by all, in like manner as if done by him alone.
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[21] The notion behind this provision as contained under s 34 of the Penal Code has been a subject of much deliberation both, by the numerous learned judges in their reported decisions as well as by learned commentators in their authoritative books, on the subject of common intention and what it entails.

[22] In the case of *Mahboob Shah v Emperor* AIR 1945 PC 118 the Law Lords in the Privy Council had this to say when dealing with an appeal where s 34 of the Penal Code was invoked, in aid by the prosecution: ' ...To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any of the persons in the same manner as if the act were done by him alone'. Their Lordships then went on to state the need to establish that there was a prearranged plan among all of the accused persons to commit the crime. Once that is established, then any act by any of them is done in furtherance of their common intention. The act would translate into the execution of the common intention.

[23] In the case of *Shaiful Edham bin Adam & Anor v Public Prosecutor* [1999] 2 SLR 57 it was ruled that '... the plan could develop on the spot. What was enquired was a meeting of the minds or acting in concert'.

[24] The learned authors of *Ratanlal and Dhirajlal on The Indian Penal Code* (34th Ed) at p 51 have this to say on the workings of s 34 of the Penal Code:

> The essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. It must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

[25] As such, to our mind, once common intention is shown to exist, thereby connoting a prearranged plan among the accused persons, then, any act however small done by any one of them, as long as it is done in furtherance of a common intention, he is liable for the offence, as if the offence is committed by him alone. That is the process under s 34 of the Penal Code in order to determine liability of persons acting in furtherance of a common intention. The issue of whether an accused person is a primary or a secondary participant on account of his degree of participation in the commission of the offence does not, with respect, arise at all in such determination. All of them are *equally as guilty* as long as they contribute acts which are done in furtherance of their common intention. In that regard, it must be reiterated that common intention has been established to have existed among them. Once that pre-condition is fulfilled, then any act done by any of them in furtherance of

that common intention, is deemed as 'shared' among them. If at all, the different degrees of participation among the accused persons may be considered by the court, in passing *sentence*, if they are found guilty and are convicted by the court. In other words, it may be relevant in *mitigation*. But in terms of *attaching liability*, a consideration of the degree of participation by the various accused persons in the commission of the offence, with respect, ought not to happen.

[26] Applying this principle underlying s 34 of the Penal Code to the evidence in the appeal before us, we were of the respectful view that the prosecution had failed to adduce direct evidence nor circumstantial evidence that could be used as a basis to link the second appellant to the act of killing the deceased on that fateful night. Although common intention may be formed immediately before the commission of the impugned act, there was no evidence led by the prosecution from which such an inference may be concluded against the second appellant to the effect that she, together with the first appellant had committed the offence of murder in pursuance of a common intention of them both. We could find no evidence of any act that was done by the second appellant that was done in furtherance of a common intention of them both.

[27] We had occasion to refer to that part of the learned trial judge's grounds of judgment where, at p 38 he had said:

> Walaupun perbuatan menikam simati telah dilakukan oleh T1, akan tetapi T2 seolah-olah tidak menghirau atau melarang T1 daripada bertindak sedemikian, malahan T2 tidak pun merasa terkejut apabila melihat keadaan simati yang berlumuran darah. Ini semua adalah satu keadaan di mana satu kesimpulan boleh diambil bahawa kedua-dua mereka mempunyai niat bersama untuk melakukan rompakan dan semasa rompakan telah melakukan pembunuhan terhadap simati.

[28] With due respect, we were of the view that nothing much could be read into it in the context of proving s 34 of the Penal Code on the part of the second appellant. To our mind, that did not fulfil the requirement to establish common intention. At the highest, the second appellant saw the stabbing. But there was no evidence to show what act she had done in the direction leading to the murder of the deceased. More crucially, where was the common intention between the first and the second appellant to commit murder. It must be recalled that the second appellant had no knowledge that the first appellant had carried with him a knife. If there was such an evidence then perhaps such an inference may be drawn, although we must quickly hasten to add here that such an inference may not be readily made against the second appellant, in the absence of any other incriminating evidence that could be attributable to her.

[29] Premised on the above, it was our respectful view that in the absence of a common intention to commit murder, the second appellant was not guilty of the murder charge under s 302 of the Penal Code. In fact, the learned Miss Deputy was candid and frank enough to admit that there was no such evidence against the second appellant, in the course of her submissions before us.

DECISION OF THIS COURT

[30] In the upshot, we had dismissed the appeal of the first appellant against his conviction for murder. We had also allowed the appeal of the second appellant against her conviction for murder on the basis that the prosecution had failed to show evidence that she had done act(s), which had the effect of furthering a common intention of them both, to commit the murder of the deceased. We had therefore acquitted and discharged her of that murder charge against her. We had affirmed the conviction for murder against the first appellant. His death sentence by hanging by the learned trial judge was also affirmed by us.

[31] We had so ordered accordingly.

First appellant's appeal dismissed and second appellant's appeal allowed.

Reported by Kohila Nesan